

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KYLE ANDREW EVERHART,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CASE NO. C16-5405 BHS
CR13-5512BHS

ORDER DENYING PETITION IN
PART, RESERVING RULING IN
PART, GRANTING LEAVE TO
AMEND, AND APPOINTING
COUNSEL

This matter comes before the Court on Kyle Andrew Everhart's ("Petitioner") motion under 28 U.S.C. § 2255 (Dkt. 1), his motion to amend and to appoint counsel (Dkt. 11), and his motion for extension of time to file a supplemental reply brief (Dkt. 15). The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby (1) denies in part and reserves ruling in part on Petitioner's motion under 28 U.S.C. § 2255, (2) grants Petitioner's motion to amend and appoint counsel, and (3) grants Petitioner's motion for an extension.

I. PROCEDURAL HISTORY

On September 24, 2014, a jury found Petitioner guilty of Possession of Methamphetamine with Intent to Distribute under 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A),

1 and 18 U.S.C. § 2. Cause No. CR13-5512, Dkt. 120. On December 15, 2014, the Court
2 entered judgment in Petitioner's case. *Id.*, Dkt. 139. On December 17, 2014, Petitioner
3 gave notice of appeal. *Id.*, Dkt. 140. On February 11, 2016, the Court of Appeals for the
4 Ninth Circuit affirmed Petitioner's conviction. *Id.*, Dkts. 216, 218.

5 On May 26, 2016, Petitioner filed his petition under 28 U.S.C. § 2255. Dkt. 1. On
6 May 31, 2016, the Court entered an order requiring the Government to answer. Dkt. 3.
7 On June 14, 2016, the Government requested an extension to answer. Dkt. 5. The Court
8 granted the Government's request, extending the response deadline to July 8, 2016. Dkt.
9 6. On July 8, 2016, the Government responded. Dkt. 7.

10 On August 1, 2016, Petitioner filed a reply to the Government's response to his §
11 2255 petition. Dkt. 10. On August 9, 2016, he moved to appoint counsel and for leave to
12 amend his petition. Dkt. 11. On August 16, 2016, the Government responded to
13 Petitioner's motion for counsel and leave to amend. Dkt. 12.

14 On September 13, 2016, the Court requested additional briefing on whether
15 Petitioner had selectively waived his *Miranda* and presentment rights prior to being
16 questioned about his involvement with suspected drug trafficking in Washington. Dkt.
17 13. On September 23, 2016, the Government filed their supplemental brief. Dkt. 14. On
18 October 3, 2016, Petitioner moved to extend to his supplemental briefing deadline. Dkt.
19 15. On October 5, the Government responded, expressing no opposition to an extension.
20 Dkt. 16. On October 17, 2016, Petitioner filed his supplemental brief. Dkt. 17.

II. FACTUAL BACKGROUND

The Government's case against Petitioner was based on Petitioner's confession that he owned two plastic bags of methamphetamine (containing approximately 10,000 pills) that he intended to distribute. Dkt. 1 at 22–23. On April 22, 2014 at approximately 9:00 am, law enforcement arrested Petitioner pursuant to a warrant at a hotel room in the Hampton Inn in Tacoma, Washington. Dkt. 7-1 at 17, 20. Packaged drugs were found in the room. Dkt. 1 at 15–23.

When Petitioner was placed in a police car and informed of his *Miranda* rights, he initially stated that he did not want to talk. Dkt. 7-1 at 27–29. He was then taken to the Pierce County Jail. Dkt. 7-1 at 18, 21. During transport, Petitioner told the officer transporting him that he wished to speak with the case officer on his arrest, Agent Brady, regarding a murder investigation being conducted in Louisiana. Dkt. 7-1 at 18, 30–31. Shortly after 9:30 am, Petitioner arrived at the County Jail. Dkt 7-1 at 18. Petitioner was then transported several blocks to the FBI office in Tacoma to await an interview with Agent Brady. Dkt. 7-1 at 31.

Before the interview, Petitioner was provided a written waiver describing his *Miranda* rights and his right to a timely initial appearance under Fed. R. Crim. P. 5. Dkt. 7-1 at 2–3, 7–10. The waiver included the following language:

I also understand that, because of my arrest, I have a right under Rule 5, Federal Rules of Criminal Procedure, to be brought before a U.S. Magistrate Judge without undue delay to be advised about the reason for my arrest, to be advised about my constitutional rights, and for consideration of bail issues.

These rights have been explained to me orally and I have read this form. I understand those rights and wish to waive them for the purpose of

1 voluntarily cooperating in a Federal investigation into suspected narcotics
2 trafficking. I understand that I can tell the agents, at any time, that I have
3 changed my mind and no longer wish to cooperate and that I will then be
4 provided an appearance before a Magistrate Judge as soon as possible.

5 *Id.* at 2–3.

6 The waiver was read aloud to Petitioner by Special Agent Wattree, whereupon
7 Petitioner indicated that he understood his rights and that he was waiving them. *Id.* at 2–
8 3, 7–10. Petitioner then signed the waiver with witnesses present. *Id.* at 7–10. Prior to
9 2:30 pm, the FBI sent the executed waiver to the U.S. Attorney’s Office. *Id.* at 10–11.

10 Agent Brady arrived at around 2:00 pm, informed Petitioner once again of his
11 *Miranda* rights, and the interview began. *Id.* at 7–11, 25. During the interview, Petitioner
12 stated that the pills discovered at the scene of his arrest belonged to him and that his
13 fingerprints would be found on them. Dkt. 1 at 22–23; Dkt. 7-2 at 8. However, law
14 enforcement could not find his fingerprints on the packaged drugs. Dkt. 7-2 at 4–7.

15 On April 9, 2014, Petitioner was indicted on three charges for Conspiracy to
16 Distribute Controlled Substances, Possession of Cocaine with Intent to Distribute, and
17 Possession of MDMA with Intent to Distribute. Cause No. CR13-5512, Dkt. 28. The
18 Government later dismissed the initial indictment of Petitioner after learning he had pled
19 guilty to overlapping charges in state court. *Id.*, Dkt. 53. However, on August 13, 2014,
20 Petitioner was again indicted on a count of Possession of Methamphetamine with Intent
21 to Distribute. *Id.*, Dkt. 60.

22 Prior to trial, Petitioner’s counsel moved to suppress the statements made by
Petitioner during the interview with Agent Brady. *Id.*, Dkt. 58. On September 2 and 8,

1 2014, the Court heard oral argument from Petitioner's counsel and the Government on
2 the motion to suppress. *Id.*, Dkts. 70, 81. At the first hearing, Agent Brady testified that
3 he recalled Petitioner invoking his right to counsel when he was read his *Miranda* rights.
4 Dkt. 7-1 at 37–38. At the second hearing, Agent Brady corrected his prior statement,
5 explaining that Petitioner did not invoke his right to counsel, but rather, only stated that
6 he did not wish to talk. *Id.* at 21–22. Petitioner's counsel emphasized Agent Brady's
7 inconsistency on cross-examination. *Id.* at 26–29.

8 On September 15, 2014, the Court denied Petitioner's motion to suppress. Cause
9 No. CR13-5512, Dkt. 86. Making its ruling, the Court stated:

10 [T]he defendant was transported to the Tacoma FBI office where he was
11 again given his *Miranda* rights twice, first by Agent Wattree and then by
12 Brady. The defendant acknowledged his rights and signed a written waiver
13 and made subsequent statements. In this case the facts before the Court
14 demonstrate that it was the defendant that initiated a request to speak to law
15 enforcement and he was given, again, his *Miranda* rights and they were
16 waived. There is no evidence that the defendant did not understand the
17 rights or the meaning and effect of the waiver. There is no evidence that the
18 law enforcement officers used any duress, made any threats or made any
19 promises to the defendant. The defendant, by signing the waiver, waived
20 his right to have an attorney present.

21 Even though there is a presumption against a waiver, a written
22 waiver is strong evidence of a valid waiver. The defendant demonstrated
sufficient competence and awareness and appeared to understand the
waiver and its effect. Viewing then the totality of the circumstances, the
waiver and the statements made were made knowingly, intelligently, and
voluntarily, and the motion to suppress his statements is denied.

Dkt. 7-1 at 38–39. The Court considered the fact that Agent Brady needed to correct his
initial testimony. *Id.* at 37–38.

1 On September 23, 2014, Petitioner's case proceeded to trial. Cause No. CR13-
 2 5512, Dkt. 112. At closing arguments, Petitioner's counsel took particular care to
 3 highlight the lack of Petitioner's fingerprints on the drugs. Dkt. 7-2 at 12–13.

4 On September 24, 2014 at 11:20 am, the jury retired to commence deliberations.
 5 Cause No. CR13-5512, Dkt. 117. At 11:47 am, the jury sent a note to the Court, asking
 6 “Is there documentation of the confession either recorded and/or signed?” and “If there is
 7 a record of the confession, may we see it?” *Id.*; Dkt. 7-2 at 15. At 12:45 pm, after
 8 conferring with the attorneys for Petitioner and the Government, the Court answered “All
 9 the physical documentary evidence that's been admitted into evidence during trial has
 10 been made available for you to review and inspect.” Dkt. 7-2 at 15–17; Cause No. CR13-
 11 5512, Dkt. 117. At 2:55 pm, the jury returned a unanimous guilty verdict. Cause No.
 12 CR13-5512, Dkt. 117.

13 III. DISCUSSION

14 A. § 2255 Petition

15 Pursuant to 28 U.S.C. § 2255 Petitioner moves to vacate, set aside, or correct his
 16 sentence. Dkt. 1. Petitioner raises four grounds for relief, all based on ineffective
 17 assistance of counsel. “To establish ineffective assistance of counsel ‘a defendant must
 18 show both deficient performance [by counsel] and prejudice.’” *Premo v. Moore*, 131 S.
 19 Ct. 733, 739 (2011) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009)). The
 20 Supreme Court has explained defendant's burden:

21 To establish deficient performance, a person challenging a
 22 conviction must show that “counsel's representation fell below an objective
 standard of reasonableness.” [*Strickland v. Washington*, 466 U.S. 668, 688

1 (1984)]. A court considering a claim of ineffective assistance must apply a
2 “strong presumption” that counsel’s representation was within the “wide
3 range” of reasonable professional assistance. *Id.*, at 689, 104 S. Ct. 2052.
4 The challenger’s burden is to show “that counsel made errors so serious
5 that counsel was not functioning as the ‘counsel’ guaranteed the defendant
6 by the Sixth Amendment.” *Id.*, at 687, 104 S. Ct. 2052.

7 With respect to prejudice, a challenger must demonstrate “a
8 reasonable probability that, but for counsel’s unprofessional errors, the
9 result of the proceeding would have been different. A reasonable
10 probability is a probability sufficient to undermine confidence in the
11 outcome.” *Id.*, at 694, 104 S. Ct. 2052.

12 *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011).

13 “The benchmark for judging any claim of ineffectiveness must be whether
14 counsel’s conduct so undermined the proper functioning of the adversarial process that
15 the trial cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686.
16 To show a trial cannot be relied upon, the likelihood of a different outcome must be
17 “substantial,” not merely “conceivable.” *Richter*, 131 S. Ct. at 792.

18 Petitioner organized his petition into four sections or “grounds.” First, he argues
19 that counsel failed to have the charges dismissed on the basis that Petitioner’s fingerprints
20 were absent from the drug packaging. Dkt. 1 at 5. Second, Petitioner argues that counsel
21 failed to have the case dismissed based on differences between law enforcement reports
22 written the day he was arrested and a subsequent report. *Id.* at 6. Third, Petitioner argues
that counsel failed to have his confession to police suppressed under the reasoning of the
McNabb-Mallory rule. *Id.* at 7. Fourth, Petitioner presents additional various factual
arguments that he believes counsel failed to adequately argue. *Id.* at 8–11.

1 **1. Fingerprints**

2 Petitioner first argues ineffective assistance of counsel on the basis that his
3 indictment should have been dismissed because his fingerprints were not found on the
4 drugs. Dkt. 1 at 5. He states:

5 “Counsel was ineffective for failure to request dismissal based on
6 the fact that Agents said; that my reindictment was based on the statement
7 ‘I told them the drugs were mine and that my finger prints would be all
8 over them;’ the Fact is that prosecutors verified that My Finger Prints were
9 NOT on any of the drugs and therefore the second indictment should have
10 been dismissed.”

11 *Id.* To support his position, Petitioner relies on two facts: (1) the investigative reports
12 written prior to his initial indictment lacked information regarding his interview with
13 Agent Brady; and (2) a later report, authored one month prior to his second indictment,
14 discussed the interview. Dkt. 1 at 5, 15–23.

15 Federal courts may dismiss indictments on two theories. “First, a court may
16 dismiss an indictment if it perceives constitutional error that interferes with the grand
17 jury’s independence and the integrity of the grand jury proceeding. . . . Second, a district
18 court may draw on its supervisory powers to dismiss an indictment.” *United States v.*
19 *Isgro*, 974 F.2d 1091, 1094 (9th Cir. 1992), *as amended on denial of reh'g* (Nov. 25,
20 1992). Under the court’s supervisory powers, “[a]bsent such prejudice—that is, absent
21 “‘grave’ doubt that the decision to indict was free from the substantial influence of
22 [misconduct]’—a dismissal is not warranted.” *Id.* (quoting *Bank of Nova Scotia v. United*
States, 487 U.S. 250, 256 (1988)).

1 Petitioner’s argument is unavailing. The absence of Petitioner’s fingerprints from
2 the drugs does not implicate any constitutional errors or prosecutorial misconduct. The
3 Government relied upon Petitioner’s confession to Agent Brady to obtain a conviction.
4 The Government never argued that Petitioner’s fingerprints were found on the drugs. In
5 fact, the Government presented an expert to testify that none of the latent prints found on
6 the drugs matched Petitioner’s fingerprints or palm print. Dkt. 7-2 at 4–7. The Court finds
7 no error in counsel’s decision not to attack Petitioner’s indictment on this basis.

8 **2. Law Enforcement Reports**

9 Petitioner next argues that counsel “fail[ed] to address the issue of the two
10 different police reports with a total and complete change of the details in the information
11 from the same investigation.” Dkt. 1 at 6. To support this argument, Petitioner relies on
12 the same police reports as he did in his first ground for relief.

13 The Court rejects this argument. The reports do not include changed or
14 inconsistent information. While the later report includes details that were not present in
15 the initial reports, this is understandable as the reports discuss different events. The initial
16 reports address the actual arrest of Petitioner while carrying out a warrant arising from
17 narcotics and murder charges in Louisiana. Dkt. 1 at 15–21. The later report addresses
18 Petitioner’s subsequent interview with Agent Brady in relation to his possession of
19 narcotics and a weapon at the time of his arrest in Washington. Dkt. 1 at 22–23. The
20 Court finds no error in counsel’s decision not to attack the reports.

3. *McNabb-Mallory Rule*

Petitioner's third argument is that his "Counsel was ineffective for failure to argue the McNabb Mallory Rule." Under the *McNabb-Mallory* rule, as modified by 18 U.S.C. § 3501(c):

[A] district court ... must find whether the defendant confessed within six hours of arrest (unless a longer delay was reasonable considering the means of transportation and the distance to be traveled to the nearest available magistrate). If the confession came within that period, it is admissible, subject to the other Rules of Evidence, so long as it was made voluntarily and the weight to be given it is left to the jury. If the confession occurred before presentment and beyond six hours, however, the court must decide whether delaying that long was unreasonable or unnecessary under the *McNabb-Mallory* cases, and if it was, the confession is to be suppressed.

United States v. Valenzuela-Espinoza, 697 F.3d 742, 749 (9th Cir. 2012) (quoting *Corley v. United States*, 556 U.S. 303, 322 (2009)). See also Fed. R. Crim. P. 5(a); 18 U.S.C. § 3501(c). A defendant may waive his or her presentment rights. *United States v. Binder*, 769 F.2d 595, 599 (9th Cir. 1985), *overruled on other grounds by United States v. Morales*, 108 F.3d 1031 (9th Cir. 1997). ("A waiver of *Miranda* rights constitutes a waiver of the rights under Rule 5.").

Petitioner executed a waiver and made his statements within the six-hour statutory safe harbor of 18 U.S.C. § 3501(c). Petitioner was arrested at approximately 9:00 am. Dkt. 7-1 at 17, 20. He expressed a desire to speak with Agent Brady at approximately 9:40 am. *Id.* at 18, 30–31. Sometime between 1:00 pm and 2:30 pm, Petitioner executed the waiver of his rights. *Id.* at 7–11, 25. At the very latest, Petitioner's waiver and confession were offered only five hours and thirty minutes subsequent to his arrest.

Petitioner also argues that his waiver of timely presentment was selective and that it applied only to charges implicated by the Louisiana murder investigation. However, the Court can find no precedent justifying the application of a selective waiver theory to the protections of Federal Rule of Criminal Procedure 5, 18 U.S.C. § 3501(c), and the *McNabb-Mallory* rule. While selective waiver is practicable in the context of *Miranda* rights, see *United States v. Soliz*, 129 F.3d 499 (9th Cir. 1997), *overruled on other grounds by United States v. Johnson*, 256 F.3d 895 (9th Cir. 2001), it would be illogical and unworkable if a defendant could waive his right to timely presentment on some charges while simultaneously demanding immediate presentment on others. Because Petitioner's confession and waiver were offered within the statutory safe harbor, the Court finds no error in counsel's decision not to raise this argument.

4. Counsel's Presentation of Various Arguments

Petitioner also asserts that counsel failed to present nine arguments at trial or to otherwise use them to obtain a dismissal. These arguments are addressed below.

a. Number One: Jury Instruction

Petitioner argues that counsel should have opposed the Court's response to a question asked by the jury during deliberations. "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *United States v. Frega*, 179 F.3d 793, 809 (9th Cir. 1999) (quoting *Bollenbach v. United States*, 326 U.S. 607, 612–13 (1946)). However, "[a] defendant seeking § 2255 relief on the basis of a faulty jury instruction can establish actual prejudice only by demonstrating that the erroneous instruction so infected the entire trial that the resulting conviction violates due

1 process.” *United States v. Dunham*, 767 F.2d 1395, 1397 (9th Cir. 1985) (internal
2 quotation and citations omitted). “[T]his is also the appropriate standard for determining
3 actual prejudice where a defendant seeks § 2255 relief on the basis of a court’s response
4 to questions by the jury.” *Id.*

5 Shortly after the jury retired to commence deliberations, it sent a note to the Court
6 asking, “Is there documentation of the confession either recorded and/or signed?” and “If
7 there is a record of the confession, may we see it?” Dkt. 7-2 at 15; Cause No. CR13-
8 5512, Dkt 117. After hearing both the Government and Petitioner’s counsel on the matter,
9 the Court declined a proposed instruction from the Government and instead returned an
10 instruction as approved by Petitioner’s counsel. Dkt. 7-2 at 15–17. The instruction stated:
11 “All the physical documentary evidence that’s been admitted into evidence during trial
12 has been made available for you to review and inspect.” *Id.*; Cause No. CR13-5512, Dkt.
13 117. After receiving the instruction, the jury returned a unanimous guilty verdict. Cause
14 No. CR13-5512, Dkt. 117.

15 Petitioner contends that the Court’s instruction was error, because it “answered the
16 jury by saying you must go off the Agent testimony.” Dkt. 1 at 8. The Court disagrees.
17 The nature of the jury’s questions indicates that they were aware there was no recording
18 of the interview or signed confession at trial. The Court’s answer appropriately instructed
19 the jury that all the evidence presented by the Government had already been provided. It
20 did so without suggesting the existence of inculpatory evidence not presented. It also
21 avoided suggesting that the jury could not consider an absence of evidence as
22 exculpatory. Never did the Court tell the jury it must rely on Agent Brady’s testimony.

1 The Court finds no error in the instruction. Even if the Court’s instruction was less than
2 satisfactory, there is no indication that it “so infected the entire trial that the resulting
3 conviction violates due process.” *Dunham*, 767 F.2d at 139.

4 **b. Number Two: Credibility of Agent Brady**

5 Petitioner argues that his “Counsel failed to mentioned that Agent Brady was
6 found lying on Search Warrant affidavit.” Dkt. 1 at 8. Petitioner’s argument refers to
7 inaccurate information in the affidavit signed by Agent Brady whereby law enforcement
8 obtained a warrant to search the hotel room where Petitioner was staying. *See* Dkt. 7-1 at
9 43–44. The inaccuracies to which Petitioner refers include (1) a statement that the drugs
10 were initially found during a sweep; and (2) a statement that Petitioner had given law
11 enforcement information regarding “76 pounds of marijuana.”

12 Petitioner’s argument fails to overcome “the strong presumption that counsel’s
13 conduct falls within the wide range of reasonable professional assistance.” *Strickland*,
14 466 U.S. at 689. Counsel attacked the inaccurate information in the search warrant in an
15 attempt to suppress evidence prior to trial. *Id.* Petitioner’s motion to suppress was denied.
16 *Id.* The Court finds that Petitioner’s argument raises no error.

17 Counsel was not ineffective when he chose not to raise this issue at trial. An
18 argument that the affidavit was inaccurate because it referred to a “sweep” of the hotel
19 room, as opposed to an invited entrance, would have made little impact on the credibility
20 of Agent Brady. The potential prejudice against Petitioner that would have resulted from
21 admitting into evidence an inaccurate statement tying him to 76 pounds of marijuana
22 would far outweigh the minimal impact such a statement might have on Agent Brady’s

1 credibility. In its ruling on Petitioner’s suppression motion, the Court has already stated,
2 “while there was some carelessness here, there was no evidence (or motive for that
3 matter) of Agent Brady intentionally misleading the issuing magistrate, nor was his
4 providing inaccurate information done in reckless disregard for the truth . . . the warrant
5 was executed in good faith.” *Id.*

6 Contrary to Petitioner’s assertion, counsel raised this issue in a suppression
7 motion. Counsel’s decision not to present this issue to the jury was not ineffective
8 assistance of counsel.

9 **c. Numbers Three and Four: Fingerprints**

10 Petitioner once again argues that he should not have been convicted because his
11 fingerprints were not found on the drugs, nor the “bag sealing machine.” Dkt. 1 at 9.
12 However, Petitioner’s counsel placed great emphasis on this argument in his closing
13 statement. *See* Dkt. 7-2 at 12–14. A claim for ineffective assistance of counsel does not
14 arise merely from counsel’s argument not prevailing. “The object of an ineffectiveness
15 claim is not to grade counsel’s performance.” *Strickland*, 466 U.S. at 697. The Court
16 finds no error or constitutional deficiency in counsel’s manner of pursuing of this
17 argument.

18 **d. Number Five: Hotel Registration**

19 Petitioner also argues that counsel failed to argue that he “was not listed on the
20 Hotel Room [where the drugs were found and he was arrested] nor was it Registered to
21 me.” Dkt. 1 at 9. He explains that this showed the Government “lacked of evidence . . .
22

1 that would make [him] owner of the pills in a Hotel Room that was not his room and his
2 finger prints were not on the pills.” *Id.*

3 However, counsel did argue that the room was in the name of Craig Everhart, not
4 Petitioner, and that “[t]here is nothing that connects [Petitioner], Kyle Everhart, with the
5 room except for his ID.” Dkt. 7-2 at 14. Also, even if counsel had not made this
6 argument, it is unlikely that it would have prejudiced Petitioner. Petitioner’s physical
7 access to the hotel room was established. He was arrested in the hotel room where the
8 drugs were present. The room was registered to a relative with the same last name. His
9 girlfriend and children were present in the room when he was arrested. Most damning,
10 Petitioner confessed to ownership of the drugs. The Court finds no error.

11 **e. Number Six: Obtaining Affidavits Prior to Testimony**

12 Petitioner next appears to challenge the effectiveness of his representation based
13 on counsel’s failure to obtain sworn affidavits from agents prior to either the suppression
14 hearing or trial. *See* Dkt. 1 at 9 (“Counsel was ineffective for failure to have agents
15 submit a sworn statement of their original statement before hearing other testimonies and
16 recanting their statements the next day.”). He claims this would have prevented agents
17 from changing their testimony to conform to that of other agents. *Id.*

18 It was not counsel’s duty to ensure that the Government’s witnesses testified
19 truthfully. Petitioner fails to cite, and the Court is unaware of, any authority suggesting
20 that defense counsel renders ineffective assistance if he fails to seek affidavits from law
21 enforcement officers prior to their in-court testimony. Furthermore, it is mere speculation
22 that such affidavits would be obtainable if sought. Rather, a witness’s responsibility to

1 testify truthfully is codified in law. “A false statement made during in-court testimony
2 constitutes perjury.” *United States v. Bonds*, 784 F.3d 582, 592 (9th Cir. 2015) (citing 18
3 U.S.C. §§ 1621, 1623). Additionally, Petitioner’s claim cannot be sustained under a
4 theory of failure to investigate. Although Petitioner complains that his counsel did not use
5 sworn affidavits to cross-examine the Government’s witnesses, he does not allege that
6 counsel was unaware of that to which the Government’s witnesses would testify. Nor
7 does Petitioner present any facts to raise concerns that counsel was unprepared for cross-
8 examination. The transcript of the suppression hearing indicates significant preparation.

9 Petitioner fails to present a substantial claim that overcomes the presumption that
10 counsel provided effective assistance of counsel on this issue. The Court finds no error.

11 **f. Number Seven: Voluntary vs. Selective Waiver**

12 Petitioner next claims that “Counsel was ineffective for failure to push the facts
13 that there were never any waiver or right to reinitiate [sic] contact nor to talk about the
14 pills nor anything *about the case in Washington*.” Dkt. 1 at 10 (emphasis added). Also, in
15 his reply, Petitioner argues that he “informed Agent Brady repeatedly that [he] was only
16 willing to only discuss the [Louisiana] murder and nothing else and [Agent Brady]
17 assured [him] that was what the waiver was for.” Dkt. 10 at 5. This argument raises
18 concerns regarding the voluntariness and validity of Petitioner’s waiver of his Fifth
19 Amendment rights.

20 Generally, “a suspect’s awareness of all the possible subjects of questioning in
21 advance of interrogation is not relevant to determining whether the suspect voluntarily,
22 knowingly, and intelligently waived his Fifth Amendment privilege.” *Colorado v. Spring*,

1 479 U.S. 564, 577 (1987). “However, the authorities must ‘scrupulously honor’ the
2 suspect’s right to cut off questioning.” *United States v. Soliz*, 129 F.3d 499, 504 (9th Cir.
3 1997), *overruled on other grounds by United States v. Johnson*, 256 F.3d 895 (9th Cir.
4 2001) (quoting *United States v. Lopez–Diaz*, 630 F.2d 661, 664 (9th Cir.1980)). The
5 Ninth Circuit has found that:

6 [A] suspect may selectively waive his right to remain silent in one of two
7 ways. He may either tell the police that he will not discuss certain subjects,
8 or the suspect may . . . inform the police that he is willing to discuss only
9 specific subjects. Both approaches effectuate *Miranda*’s requirement that a
10 suspect in custody have the right to remain silent or, at his discretion, to
11 limit questioning.

12 *United States v. Soliz*, 129 F.3d 499, 504 (9th Cir. 1997) (internal citations omitted). *See*
13 *also United States v. Ho*, 232 F.3d 897 (9th Cir. 2000); *United States v. Lopez-Diaz*, 630
14 F.2d 661, 664 (9th Cir. 1980); *United States v. Lorenzo*, 570 F.2d 294, 297–98 (9th Cir.
15 1978) (“It is also clear that a suspect may, if he chooses, selectively waive his Fifth
16 Amendment rights by indicating that he will respond to some questions, but not to
17 others.”). *But see United States v. Farley*, 607 F.3d 1294, 1329–30 (11th Cir. 2010).

18 The Ninth Circuit has also recognized

19 a critical distinction between . . . an inquiry for the limited purpose of
20 clarifying whether the defendant is invoking his right to remain silent or has
21 changed his mind regarding an earlier assertion of the right and, on the
22 other hand, questioning aimed at eliciting incriminating statements
concerning the very subject on which the defendant has invoked his right.

United States v. Lopez-Diaz, 630 F.2d 661, 665 (9th Cir. 1980).

Petitioner’s argument that he repeatedly stated a desire to limit his interview to
details about the Louisiana homicide investigation implicates the Ninth Circuit’s *Lopez-*

1 *Diaz* and *Soliz* line of decisions. There was a two-day hearing on Petitioner’s motion to
2 suppress, at which counsel argued that Agent Brady’s interview of Petitioner was
3 unlawful. Dkt. 7-1 at 32–44; Cause No. CR13-5512, Dkts. 70, 81. Specifically, counsel
4 argued there was not a valid waiver of Petitioner’s *Miranda* rights because Petitioner had
5 allegedly already requested an attorney. The Court found otherwise. Dkt. 7-2 at 38–39
6 (“[I]t was the defendant that initiated a request to speak to law enforcement and he was
7 given, again, his *Miranda* rights and they were waived.”). However, counsel did not
8 argue that Petitioner had invoked his right to remain silent about the Washington drug
9 trafficking investigation through a selective waiver.

10 Petitioner now asserts that his waiver was selective and that Agent Brady’s
11 questions about the Washington narcotics trafficking investigation, which resulted in
12 Petitioner’s confession, violated Petitioner’s right to limit the scope of his waiver.
13 Factually, Petitioner’s argument is strengthened by several aspects of the record. First,
14 the Court notes its own recorded observation that Petitioner “told [the officer transporting
15 him to Pierce County Jail] that he wanted to talk about the homicide investigation in
16 Louisiana.” Dkt. 7-1 at 38.¹ Next, the Court notes Agent Brady’s acknowledgment that
17 the officer transporting Petitioner to jail informed him that Petitioner wanted to speak
18 specifically about the Louisiana homicide investigation. Dkt. 7-1 at 24 (“Mr. Everhart
19 wanted to talk to me about the incident in Louisiana.”). Other details in the record further
20 support Petitioner’s argument, including: (1) the testimony of the officer transporting

21
22 ¹ The Court has made no finding whether or not Petitioner requested to speak to Agent
Brady *only* about the Louisiana homicide investigation.

1 Petitioner, observing that Petitioner wanted to talk about the Louisiana murder
2 investigation, Dkt. 7-1 at 18; (2) Petitioner's repeated assertions that he asked to limit the
3 interview to the Louisiana murder investigation and that Agent Brady confirmed that was
4 the scope of his waiver, Dkt. 17 at 4, Dkt. 10 at 5; and (3) the fact that the interview was
5 bifurcated into two distinct sections, the first dealing with the Louisiana homicide
6 investigation, and the second dealing with the Washington narcotics trafficking
7 investigation, Dkt. 14-1 at 15.

8 The Government argues that the written waiver states it was "for the purpose of
9 voluntarily cooperating in a federal investigation into suspected narcotics trafficking."
10 Dkt. 14 at 1; Dkt. 7-1 at 2. This is strong evidence that Petitioner voluntarily waived his
11 Fifth Amendment rights regarding the narcotics investigation. However, if Petitioner's
12 assertions are true, placing such language in a printed waiver may, after viewing the
13 totality of the circumstances, be insufficient to overcome concurrent and repeated oral
14 assurances by law enforcement that any waiver would be limited to the Louisiana
15 homicide investigation.

16 The Court finds that important questions of fact must be answered before the
17 Court can decide this issue. The Court needs a more detailed understanding of the
18 statements and events surrounding the reading and signing of the waiver and the
19 subsequent interview. Therefore, the Court reserves ruling on this issue.

20 **g. Number Eight: Law Enforcement Reports**

21 Petitioner again asserts error in counsel's failure to attack the law enforcement
22 reports based on their dates of authorship and the fact that they describe different events.

1 Dkt. 1 at 10. His argument here is identical to his second stated ground. The Court finds
2 no error.

3 **h. Number Nine: Cross-Examination of Agent Brady**

4 Petitioner's final argument is that "Counsel was Ineffective for failure to better
5 Cross examine Agent Brady for changing his testimony" on the second day of the
6 suppression hearing. Dkt. 1 at 11.

7 On the first day of Petitioner's suppression hearing, Agent Brady testified that
8 Petitioner invoked his right to counsel when he was escorted from the hotel room and
9 received his *Miranda* rights. Dkt. 11 at 4; Dkt. 7-1 at 37. However, on the second day,
10 Agent Brady corrected his prior testimony and stated that Petitioner had only expressed
11 that he did not wish to talk. *Id.* at 21-22. Counsel thoroughly cross-examined Agent
12 Brady, placing great emphasis on the fact that Agent Brady needed to correct his earlier
13 testimony. Dkt 7-1 at 26–29.

14 Counsel's strong emphasis on Agent Brady's need to correct prior testimony is
15 reflected in the Court's ruling:

16 While Officer Brady in the first hearing testified that the defendant
17 invoked his right to counsel, in the second hearing he changed his
18 testimony and said that he had been mistaken in his earlier testimony and
19 that the audio portion of the video recording taken in the patrol car is
20 accurate, that the defendant in fact, when given his *Miranda* rights and
21 asked if he wanted to speak, answered that he did not. The video confirms
22 this testimony, and there is no evidence from any witness that the *Miranda*
rights were given to the defendant at any time prior to the ones given in the
patrol car or that there was any request for legal counsel before that time.
Indeed, in his earlier testimony he said that the request for an attorney came
after Hamilton advised defendant of his rights and after he answered "no"
to the question of whether he wanted to talk. Hamilton testified that
defendant did not ask for an attorney after the defendant said he did not

1 want to talk. Brady's first recollection of the request coming right after
 2 defendant declined to talk (and not at some time earlier as argued by the
 3 defendant) is compelling evidence that Brady had simply misremembered
 4 when he testified at the first hearing.

5 Even if the Court were to find that the earlier Brady testimony was
 6 to be believed over his later testimony, law enforcement was not under any
 7 obligation to immediately provide the defendant with an attorney. It only
 8 had an obligation to not question him without an attorney present.

9 *Id.* at 37–38. Noting the mistake in Agent Brady's initial testimony, the Court nonetheless
 10 denied Petitioner's motion. *Id.* at 39.

11 Contrary to Petitioner's assertion, counsel adequately cross-examined Agent
 12 Brady regarding the change in his testimony. Even if he had not, the Court ultimately
 13 determined that law enforcement had no obligation to immediately provide an attorney
 14 and that Petitioner's subsequent statements were self-initiated. *Id.* at 38–39. The Court
 15 finds no error.

16 **5. Prejudice**

17 In the majority of the issues discussed above, even had counsel's performance
 18 fallen below the reasonable standard of conduct, Petitioner has failed to show he was
 19 prejudiced. The Government's case, based on Petitioner's confession, was strong. The
 20 only issue wherein Petitioner may be able to show prejudice is the contention that his
 21 *Miranda* waiver was selective and that his confession was therefore inadmissible. The
 22 Court has reserved ruling on that issue. Otherwise, none of Petitioner's contentions, even
 if true, show a "reasonable probability [of error] . . . sufficient to undermine confidence
 in the outcome." *Strickland*, 466 U.S. at 694. While a different outcome is tenuously
 conceivable had counsel approached the trial differently, the likelihood of such an

1 outcome is not substantial. *Richter*, 131 S. Ct. at 792. Therefore, except for the issue of
2 selective waiver, upon which the Court reserves ruling, Petitioner has failed to show
3 actual prejudice. The parties will address whether Petitioner can show prejudice on the
4 issue of selective waiver after counsel is appointed and the petition is amended.

5 **B. Motion for Extension**

6 Petitioner moved to extend his deadline to file supplemental briefing. Dkt. 15.
7 Although the Government timely filed and served its supplemental brief, it does not
8 oppose the motion. Dkt. 16. The motion is granted.

9 **C. Motion for Leave to Amend and to Appoint Counsel**

10 Petitioner seeks to amend his petition as a matter of course, or in the alternative,
11 seeks leave of the Court to do so. Dkt. 11. Petitioner may not amend as a matter of course
12 as, when he filed his motion, over 21 days had passed since the Government responded to
13 his petition. Fed. R. Civ. P. 15(a)(1). However, Petitioner has raised factual and legal
14 issues that would benefit from further development; namely, whether his *Miranda* waiver
15 at the time of his interview was selective and whether his counsel was ineffective in
16 failing to argue for suppression on a theory of selective waiver. Pursuant to Fed. R. Civ.
17 P. 15(a)(2), the Court grants Petitioner leave to amend his § 2255 motion regarding this
18 issue.

19 Petitioner also moves to appoint counsel. Dkt. 11. Title 28 U.S.C. § 2255(g)
20 provides that the Court may appoint counsel for Petitioner under 18 U.S.C. §
21 3006A(a)(2)(B). Moreover, Rule 6(a) of the Rules for Section 2255 proceedings,
22 provides that the Court *must* appoint an attorney for a moving party “who qualifies to

1 have counsel appointed” and “[i]f necessary for effective discovery.” The Court has
2 determined there are important questions of fact about the circumstances surrounding
3 Petitioner’s *Miranda* waiver. Also, by arguing ineffective assistance of counsel, there will
4 likely be necessary discovery regarding privileged communications between Petitioner
5 and his trial counsel. *Bittaker v. Woodford*, 331 F.3d 715, 716 (9th Cir. 2003). The
6 motion to appoint counsel is granted.

7 IV. ORDER

8 Therefore, it is hereby **ORDERED** that Petitioner’s motion under 28 U.S.C. §
9 2255 (Dkt. 1) is **DENIED in part** and ruling is **RESERVED in part** as stated herein.
10 Petitioner’s motion for extension is **GRANTED**. Dkt. 15. Petitioner’s motion for leave to
11 amend and to appoint counsel (Dkt. 11) is **GRANTED**. The parties shall work with the
12 Clerk to schedule further proceedings.

13 Dated this 1st day of November, 2016.

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16 BENJAMIN H. SETTLE
17 United States District Judge
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